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CONSTITUTIONAL LAW—ORIGINAL EXPLICATION: A DEMOCRATIC MODEL FOR THE INTERPRETATION OF MODERN STATE CONSTITUTIONS^{*}

JORGE M. FARINACCI-FERNÓS[†]

INTRODUCTION

This Article proposes a model of constitutional interpretation for U.S. state courts that takes into account the authoritative adoption history of their respective state constitutions, particularly those that were adopted in the twentieth century and were the result of a highly democratic, public, participatory, popular, and socially transcendental process of creation. From a methodological perspective, I offer the model of *original explication*. This method has already been implemented in foreign countries like Bolivia,¹ and U.S. jurisdictions like Puerto Rico.² U.S. states that adopted constitutions through similar processes should follow their lead. Other countries can also jump in.

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1. See generally Jorge M. Farinacci-Fernós, *When Social History Becomes a Constitution: The Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication*, 47 SW. L. REV. 137 (2017).

2. See generally Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JURIDICA U. INTER. P.R. 203 (2016).

Like Bolivia and Puerto Rico, many U.S. state courts that are charged with implementing their respective modern constitutions are at a crossroads. On the one hand, these constitutions are very different from their federal counterpart,³ particularly as to the *process of their creation* and their *substantive content*. However, many state courts simply adopt the currently available methods of interpretation, which were designed with the particular circumstances of the federal Constitution in mind, thus ignoring the normative force of their respective adoption histories and the substantive content they produced.

This Article wishes to start a deliberate and conscious conversation about how to go about helping state courts adopt a method of constitutional interpretation that takes into account both the substantive content and, more importantly, the process of creation of their respective constitutions.⁴ I believe original explication is the appropriate model for state constitutions created through a highly democratic, public, participatory, popular, and socially transcendental process of creation.

Since, as we will see, the reasons for adopting original explication stem directly from the normative force generated by the constitutional adoption process, I will first analyze the normative case for the adoption of original explication and then turn to an in-depth analysis of its actual content. For purposes of clarification, I will offer a brief summary of what original explication is at the start, so we can immediately dive into its normative justifications, which, in turn, determine the actual content of the model itself. In other words, the *why* determines the *how*.

As such, this Article is divided into the following Parts: (I) this Introduction; (II) a brief description of original explication; (III) the normative justifications for the adoption of such a model in the context of state constitutions that were adopted, mainly in the twentieth century, through a highly democratic, public, participatory, popular, and socially transcendental process of creation; (IV) the relationship between creation process and substantive content, and its impact on the task of judicial interpretation and enforcement; (V) an in-depth description of the original explication model itself; (VI) how original explication would be applied

3. I do not propose, and in fact would reject, the application of the original explication model to the U.S. Constitution. As we will see, the main normative requirements for the use of this model are: (1) a democratic, public, participatory, popular, and socially transcendental process of creation, and (2) an existing fidelity to the content of the original constitutional project. From my point of view, both elements are completely missing in the federal context. As such, original explication should only be applied to state constitutions that have these normative elements.

4. See generally Jack L. Landau, *Some Thoughts about State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837 (2011).

in terms of the judicial enforcement of the type of substantive constitutions these processes tend to generate, with an emphasis on its uses of text, intent, purpose and, particularly, adoption history; and (VII) some of the implications the adoption of this model can have in terms of constitutional theory, as to the judicial enforcement of modern constitutions. At the end, I offer some final thoughts.

I. ORIGINAL EXPLICATION: A BRIEF DESCRIPTION

Normally, I would be inclined to start this Article with an in-depth, descriptive analysis of the inner workings of the original explication model and then turn to its normative justifications. But in this case, to do that would be missing the mark completely. That is so because the original explication model is the direct result of its normative underpinnings. It is not meant to be, though conceptually it could, a stand-alone model. On the contrary, it can be argued that its existence is premised on a particular historic experience: the nature of the process of constitutional adoption. In other words, the process generates the method.

As previewed, I will first analyze these normative underpinnings and then turn to the descriptive analysis of the model itself. But, in order to avoid any unnecessary suspense or any possible confusion, I offer a *brief* description of the original explication model, so as to give the reader a better understanding of the overarching arguments.

Original explication is a method of interpretation and construction that treats official adoption history, *particularly the outwardly-uttered expressions of the framers of a democratically-elected body during its public deliberations*, as authoritative both as to the communicative meaning of the constitutional text, and as to its normative content.⁵ The term “explication” refers to the different manifestations of the outwardly-uttered expressions of the framers, including, but not limited to, intent, purpose, explanations, possible applications, communicative meaning, legal effect, scope, and reach. As long as they were made publicly during the official deliberations of the framing body, all of these utterances will carry significant, and mostly authoritative, normative weight. As such, explication treats the *words* uttered by the framers as *the authoritative source of constitutional meaning*.

As a result, the main role of interpreters is to interpret *those words* which, in turn, establish the authoritative meaning of the constitutional text itself. In other words, the main source of constitutional meaning is

5. See generally Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

not the text itself, but the explications of its framers *during* the deliberative process. In terms of sources, this model gives particular weight to the public, official, and formal records of the constitutional creation body.

II. THE NORMATIVE JUSTIFICATIONS FOR THE ORIGINAL EXPLICATION MODEL

Conceptually, original explication is neither inherent nor alien to any system. It can be adopted by different types of constitutions, even though they were not the result of a popular or democratic process of creation. At the same time, it can be rejected by constitutions that were the result of a transcendental social process. I argue in this Part that, as a relative matter, *there is a stronger normative case in favor of the latter* adopting an original explication model of constitutional interpretation and construction, as opposed to the former. In other words, constitutions that are the result of a highly democratic, public, popular, participatory, and socially transcendental process of constitutional creation have a stronger normative case in favor of adopting this model and against rejecting it. In fact, as previewed, one could argue that the existence of this type of process of creation is the antecedent event that gives birth to original explication in the first place and justifies its use.

As such, the key to the original explication model is the nature of the constitution-making process itself. As we will see shortly, when the process is highly democratic, public, participatory, popular, and socially transcendental in nature, the stated purposes, goals, and reasons of the framers that generated the text receive special importance, even more than the text itself. In other words, the *why* behind the text is as important, if not more important, than the text that was produced, precisely because of the particular nature of its creation process. In these circumstances, process generates and informs substance.

This requires an analysis of the constitutive parts of the type of process to which I refer as they relate to the method of interpretation. As previewed, original explication is the methodological result of constitutional creation processes that were democratic, public, participatory, popular, and socially transcendental. I will briefly address each one of these elements individually, but only as it pertains to their normative role in the interpretive process.⁶

6. For reasons of space, this Article will assume the existence of such a process and focus exclusively on its relation to the actual operation of the original explication model. I am currently working on a normative proposal as to that type of process titled: HOW CONSTITUTIONS ARE INTERPRETED DEPENDS ON HOW THEY ARE CREATED: WHEN HISTORY REQUIRES THE USE OF HISTORY IN CONSTITUTIONAL ADJUDICATION (unpublished manuscript) (on file with author).

First, the *public* nature of these processes strengthens the case in favor of giving substantial weight to the official public deliberations of the framing body. This public characteristic is what gives original explication its main normative force. As such, when democratically-legitimized constitutional legislators *publicly* state their reasons, objectives, intentions, and understandings of what the text they are adopting means (both semantically and legally), and they do so *during* the public deliberations of the constitution-making body, that exercise becomes more important than the eventual make-up of the specific text. This is so because the main normative force of the constitution stems from its process and not its actual textual product.

For example, this phenomenon has a direct impact on the process of identifying the semantic or communicative content of the constitutional text. This model can be articulated both in terms of explication as a form of *public meaning* or explication as the *best evidence of meaning*. In both cases, the relevant intent is the one which is externally expressed during the formal process of constitutional creation. This is so precisely because the forum with the most political legitimacy is the public deliberations of the constitutional body. As a result, the People accept that the constitution means what the framers *publicly told them it meant during the deliberations of the constitutional body*.

This leads us directly to the second element of the process—its *democratic* nature. When the body charged with writing and adopting a constitution has a strong democratic mandate, its deliberations become part of that democratic process. As a result, what goes on during those deliberations has irresistible normative force. Moreover, we must not forget that the democratic nature of the process is not limited to the deliberative body. It is also applicable to the antecedent stages. Those stages also become part of the authoritative adoption history of the constitutional creation process. The democratic nature of the process elevates the framers from mere writers to legitimated representatives of a self-constituted People. As such, when we focus on the framers, we do not do it as individuals, but as agents of a broader democratic project.

The third element is *participation*. When the People are highly engaged in the constitutional creation process, whether through the election of the members of the deliberative body or the constant interaction with that body *during its deliberations*, the People stop being passive actors, waiting to see the product of the elected framing body, and instead become the main driving engine of the entire project. As a result, focusing on the deliberations of the framing body puts interpreters in the same position as the sovereign People. As such, the deliberations of the framing body are not an ordinary parliamentary experience, but an

interactive process where People and framers merge. This adds to the normative force of the framing body and its formal deliberations.

Fourth, we deal with the *popular* nature of the creation process. This is closely related to the democratic nature of the constitution-making process, and it refers to the level of substantive engagement by the People. In other words, whether the constitution that is being drafted adequately reflects the policy preferences of the public. When the constitution does this, it becomes the People's constitution. Again, this leads us to the issue of legitimacy and normative force; in this case, as the result of popular approval, not so much of the final text, *but of the process that created it*.

Finally, I address the *socially transcendental* character of the process. By transcendental, I refer to those historical social processes that constitute a turning point or milestone in any given political community and that substantially redirect the development of that society. In these instances, the chosen method of interpretation must take into account the events of that pivotal social moment, particularly through the use of formal adoption history. This is so because the body that adopts the constitutions in these circumstances reflects the transcendental nature of the historical process at hand.

In that sense, the main underlying premise behind the case for the adoption of original explication in the case of modern state constitutions is their *process of creation*. The democratic, popular, participatory, socially transcendental, and above all, public nature of the process strengthens the case in favor of explication as the crystallization of that process in terms of legitimizing force, normative value, and significance.

This leads us to two final, but crucial, subjects. The first one has to do with the basic normative justification of this model and the overarching basis for original explication. I refer to the *legitimacy* of the formal constitution-making process and its impact on interpretive methodology. The second one involves one of the main objections to intent-based methods of interpretation. I refer to how the sheer normative force of that process washes away any objections as to the so-called "collective intent problem."

As to *legitimacy*, when a constitution-making process possesses the above-identified qualities (democratic, public, participatory, popular, and socially transcendental), the line between the representative body and the People blurs significantly, even to the point of normative irrelevance. As a result, the framing body assumes the role of the self-constituted People. As such, its deliberations and expressions have the utmost normative force. This legitimacy makes adoption history authoritative. When, on

the contrary, the process lacks these elements, the normative force of the framing body is severely reduced.⁷

As previewed, *legitimacy* leads to *authority*. These two elements supply the main normative justification for any choice as to interpretive methodology. For example, intent-based methods of interpretation can be characterized as inappropriate if the framers of a constitution lack legitimacy, and thus, authority. On the other hand, if the framers do, in fact, possess legitimacy and authority, it would be inappropriate to reject intent-based methods of interpretation.

This brings us to the so-called collective intent problem,⁸ which has served as one of the main objections against the use of intent-based methods of interpretation. In essence, the objection is based on the physical impossibility of single-group thinking. When it comes to legislative bodies, the objection goes, the only common link is the text that is being approved. The reasons, motivations, purposes, and goals of the framers are irrelevant because they can never transcend the individual sphere and become collective, unless, of course, they are articulated as text.

But the so-called collective intent problem is really more conceptual than physical. From a normative standpoint, *it doesn't matter if collective intent actually exists in the physical world*. On the contrary, *it is a legal fiction, whose existence and usefulness depends solely on its normative force*. When this happens, the only empirical problem is the availability of accurate sources. If accurate, the actual content of those sources is accepted as an authoritative reflection of the collective intent of the framing body.

I do not deny the physical problem of collective intent. But that physical problem does not equal normative impossibility. Collective intent, as a legal fiction, can exist if there are enough normative justifications for it. In the case of creation processes that were democratic, public, participatory, public, and social transcendental, this legal fiction acquires great, and virtually unsurmountable, normative force. In these

7. See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482 (1985).

8. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 2 (2009); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248 (2009); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 B.Y.U. J. PUB. L. 283, 295 (2014); John Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1760 (2012).

situations, the political community *accepts* the legal fiction, thus freeing its courts from the philosophical and conceptual quagmire.⁹ In other words, if the People see the creation process as legitimate and authoritative, then the framing body, *not necessarily its individual members*, is believed to act as a single entity with a particular intent.

III. HOW THE PROCESS CREATES SUBSTANTIVE CONTENT

As we've seen, the main normative justification for the original explication model is the process of constitutional creation. From a purely conceptual point of view, democratic, public, participatory, popular, and socially transcendental processes of creation can generate a wide variety of constitutional types with differing content. But, from a historical perspective, this type of process generally, though not inherently, results in a particular type of constitution: a teleological constitution.¹⁰

The main characteristic of modern teleological constitutions is the substantive nature of their content. That is, unlike the federal Constitution whose main focus is setting up the structure or *framework* of government, teleological constitutions focus on substantive policy issues, such as economic organization, social relations, labor rights, and environmental protection, among many others. As a result, the main objective of these constitutions is to directly influence the development of a particular society through the adoption of enforceable substantive policy preferences in the constitutional text.

As previewed, the normative justification for the original explication model lies primarily in the process of constitutional creation. Yet, because the type of creation process that requires original explication also tends to generate teleological constitutions, original explication becomes an important tool in the adequate enforcement of the substantive content of these constitutions as well. In that sense, original explication is the direct result of *both* the creation process and the substantive content generated

9. See Jorge M. Farinacci-Fernós, *Looking for the Correct Tool for the Job: Methodological Models of Constitutional Interpretation and Adjudication*, 52 REV. JURIDICA U. INTER. P.R. 213, 245 (2018).

In constitutions that are the product of high-energy democratic politics, popular mobilization and participation, social and historical transcendent moments, and are also public in nature, the concept of collective intent becomes less controversial. If the political community accepts, *as a political choice*, that a certain multi-member body is authorized and legitimized to act on behalf of the people, their *intent* is conceptually feasible, which is wholly separate from the empirical issue

Id. (emphasis in original).

10. See Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 1, 32–37 (2018).

by that process. As we have seen, in these circumstances, process tends to be the overriding factor. However, we must not forget the substantive content that comes out of this process. Original explication is designed to fit with the type of substantive content that generally, though not inherently, accompanies constitutions that were adopted through a democratic, public, participatory, popular, and socially transcendental process of creation.

The relation between process and substance is twofold. First, that the democratic, public, participatory, popular, and socially transcendental process of constitutional creation tends to adopt constitutions that contain policy preferences in the text that will reflect the views of the social majority. In that sense, these types of processes tend to generate constitutions that, instead of being “neutral,” are full of policy-laden substantive text. Historically, this content can be described as “post-liberal.” Second, the sheer normative force of the creation process, and its status as the main source and cause of substantive content, impacts the way we interpret that substantive content in the first place. In other words, because the substantive content of these constitutions reflects a deliberate attempt to mold the way society will function and develop, the text itself acquires a teleological character. When this happens, the model of interpretation used must give an active role to purpose and intent. Original explication accounts for that role.

Accordingly, we must analyze the role of substantive content in the interpretation and application of these types of teleological constitutions. In these instances, because the *why* is as important as the *what* in terms of the actual text, which is explicitly designed to achieve policy objectives, the *explication* of the words—which tends to allow for further explanation, development, and elaboration—can actually facilitate the obtainment of those goals. In other words, teleological constitutions, because of their substantive content, need courts to focus on their texts, their purposes and the intent of those who adopted them. It is very difficult, not to say impossible, to ignore intent when interpreting and applying most, if not all, teleological constitutions. In that sense, original explication links process with substance.

IV. THE INNER WORKINGS OF THE ORIGINAL EXPLICATION MODEL

Original explication encompasses two important elements: (1) the general *social process* that originated the constitution-making process, and (2) the particular *creation process* itself. After taking into account the former, original explication then focuses on the official record of the constitution-making body. As stated, this is due to the fact that the social process that gave birth to the constitutional project places its legitimacy

on the constitution-making body itself.¹¹ As such, interpreters must look there to find the ultimate source of constitutional authority and meaning.

Methodologically, original explication uses the official records of the constitution-making body as either the authoritative source of constitutional meaning or, at least, the best evidence of it. As a result, the words uttered during the deliberations of the constitutional framers are given legal status and are treated as authoritative legal texts. As such, they are the object of interpretation, *almost like the constitutional text itself*. In particular, interpreters look for utterances that indicate intent, purpose, design, goals, elaboration, explanation, application, and clarification as to meaning, scope, and effect. In the end, the framers themselves become the primary interpreters of the constitutional text, and courts are tasked with (1) interpreting that interpretation, and (2) interpreting the constitutional text when the framers have not offered their own interpretation, or it is insufficient to solve a particular legal question.¹²

Here, the constitutional text is the beginning of the analysis, but it is neither the end of the interpretive process nor its most important feature. The constitutional text is always subject to the explication of the framers, who may address issues ranging from semantic meaning to prospective application. As we will see, most, though not all, constitutions created through this process tend to generate substantive text. And, precisely because of the substantive nature of the constitution itself, purpose will be a vital tool of interpretation, construction, and adjudication. In other words, highly democratic processes of constitutional creation tend to privilege purpose as the main driving force of the text. As such, this requires a model of interpretation that privileges the original purposes of the framers *as expressed during the deliberations of the framing body*.

As we saw, original explication is inherently linked with a transcendental, comprehensive, democratic, and popularly engaged process of constitutional creation. *The public nature of its creation is one*

11. Farinacci-Fernós, *supra* note 1, at 150.

12. In that sense, original explication has its *own* form of the contribution thesis. According to its proponents, “[t]he contribution thesis holds that the Constitution’s meaning contributes to the content of constitutional law.” Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Problems and Practical Differences*, 87 NOTRE DAME L. REV. 253, 263 (2011). In other words, the communicative content of the constitutional text must “contribute” to or guide its legal effect. In particular, interpreters must make sure that the legal effect given to a constitutional provision doesn’t contradict its communicative content. In the context of the model discussed in this Article, the final construction given to the text must also never contradict the explication of the framers. As a result, not only must the normative content adopted by future interpreters be consistent with the constitutional text, *it must also be consistent with the framers’ interpretation of the text*.

of its main defining features and sources of legitimacy. Without a visible and public process of constitutional creation, original explication loses much, although not all, of its normative power. In that sense, original explication is better suited for modern state constitutions *that were created by* socially transcendental and highly democratic constitutional processes.¹³

The contrast between the process of adoption in the context of some state constitutions and the federal Constitution is striking. While Philadelphia was a secret meeting, many modern state conventions were highly public and transparent. Also, the Convention in Philadelphia was not elected for the purpose of adopting a new constitution, nor did its individual delegates go before the People to acquire a mandate as to particular policy positions. In contrast, many modern state conventions were directly elected for the stated purpose of drafting a new constitution and after an electoral campaign where the substantive issues as to the content of the new constitution was waged.¹⁴ While the Convention in Philadelphia was a meeting of representatives of the country's elite and wealthy, many modern state conventions reflect the real social composition of their population. While the Philadelphia Convention did not articulate a process for outside participation, many modern state constitutions allowed for public opinion to directly influence the drafting processes, not just their ratification.

As previewed, original explication focuses on what the constitutional framers *said and did during the formal deliberations of the constitution-making process.* This includes references to reasons, intent, purposes, goals, scope, and even possible applications of the constitutional text that is being adopted. Also, explication includes explanations related to the semantic and legal meaning of words.

Let's turn first to the issue of communicative meaning. For example, if a particular word or set of words has a settled linguistic meaning, but the framers publicly state that said word or set of words will have a somewhat different meaning, the latter trumps the former. It can also shed light on the *underlying factual premises that led the framers to adopt a particular constitutional provision.* This could help interpreters later on

13. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1028 (1984); Lee J. Strang, *Originalism and the "Challenge of Change": Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 940 (2009).

14. See, e.g., G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1080 (2005).

in order to avoid both anachronistic adjudication and charges of judicial usurpation.

There is an open question, however, as to the *extent* of explication in terms of the meaning of constitutional provisions. On the one hand, there is explication *as meaning*. That is, the statements, explanations, and elaborations made by the framers during the constitution-making process *are* the meaning of the words of the constitution. In other words, the framers' intent is not evidence of meaning but the meaning itself. A lesser version of this approach is that the original explication of the framers is the *best evidence of meaning*. As a result, there is some theoretical space between the explication and the actual meaning of the words. This would allow the use of *additional* evidences of meaning when carrying out both communicative interpretation and legal construction. Yet, as a practical matter, the authoritative nature of the explication, and the empirical richness that normally accompanies it, limits the gap to the point of virtual irrelevance. In the end, *both alternatives are consistent with the original explication model*.

As to the substantive and normative content of the text, original explication also has an important role to play. For example, the issues of intent and purpose have several manifestations and implications. First, the issue of the *reasons or purposes* that drove the framers to adopt a particular word or set of words—or *why* they did what they did. Second, the *objectives or goals* that motivated the framers—or *what* they were trying to achieve. Third, the *understandings* of the framers—or their linguistic and legal *assumptions* that impact the meaning of the adopted text. And finally, the purposes and goals *of the constitutional project itself*—or in addition to the goals the *framers* publicly expressed they were trying to achieve, what is the goal *of the Constitution* as adopted and contextualized by original explication.

Therefore, if a constitution's content is full of substantive policy preferences that were adopted as the direct product of a *result-oriented process*, then the intent, purpose, and goals of the framers must be taken into account, *precisely because it is there that we will find the source and content of that substance*. If the text of a constitution can be characterized as inherently or substantively teleological in nature, then we must privilege the sources that will yield that content. And in the context of the particular process of creation that has been discussed so far, only original explication can adequately deal with process and substance at the same time.

Finally, an obvious question comes to mind when analyzing the concept of original explication: how is it different from the other intent-based methodologies currently used in the United States, particularly

original intent, original public meaning, and the subjective teleological model? Original explication is partially a combination of these approaches and also a separate and distinct model of interpretation. I now turn to a contrast between original explication and its other intent-based counterparts of constitutional interpretation, so we can better appreciate its form and understand its differences with these alternatives.¹⁵

A. *Original Intent*

Original intent focuses on what the framers attempted or wanted to do when they enacted the constitutional text.¹⁶ In other words, it tries to identify what they were *trying* to communicate through the text. This refers to both communicative and normative content. This would also include, for example, the original expected applications of the framers. This means that when interpreting or applying a particular constitutional provision, we should analyze how the authors would interpret it or apply it.

In its weakest form, original intent only treats the authors' views as to the communicative meaning and legal effect of their words as authoritative. Since the text is merely the articulation of the authors' thoughts, it is imperative to know what the authors thought the text they adopted meant. In its strongest form, original intent treats the authors' views as to how the text should be applied in a particular case or controversy as authoritative as well. This responds to the view that a legal text should only be applied consistently with its authors' views. Needless to say, this latter articulation of the original intent model can be very speculative, particularly with controversies that were never analyzed or contemplated by the framers.

The main difference between original explication and the model of original intent is the way in which intent is articulated. Intent can be inward, private, and unknown to others; explication is always external, public, and shared. Also, intent can be informal and unofficial, while explication is always formal and official.

This, for example, has a direct effect on the issue of sources. While some versions of original intent allow for private conversations,

15. For a more in-depth analysis of these models and how they contrast with each other, see Farinacci-Fernós, *supra* note 9.

16. See generally Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Richard S. Kay, *The Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

correspondence, and other writings to be used to ascertain an individual's intent, as well as publicly expressed intent made *outside* the formal constitutional-creation process, explication is *limited to the publicly made statements and actions of the constitutional legislator while acting in that capacity*. This is so because political authority and legitimacy is given by the *process*, not by the *individual*. As such, *only* the publicly made statements made during deliberations are authoritative. Other statements, whether private or made publicly but outside the constitutional deliberations, are given only persuasive, contextual, or secondary weight.

Furthermore, intent has the problem of abstraction and a level of generality. This is so because it is sometimes up to the *interpreter* to ascertain that intent, especially when it was not articulated by the framers. In that sense, ascertaining intent becomes an exercise in reverse engineering or deduction. In the original explication model, the formality of the statements made by the framers allows interpreters to address them *as they would any other legal text*. After all, the explications of the framers are laid out in formal and official documents—mostly transcripts of the deliberations of the constitution-making body; in other words, *they become text* and, thus, are subject to interpretation.

Yet, because of the nature and structure of that text, the problem of under-determinacy¹⁷ is less as compared to the formal constitutional text. This is due to the fact that constitution makers tend to be terser in terms of the selection of words for the formal constitutional text in order to make it practical and accessible, while they have a much freer hand in elaborating during the deliberations of the constitutional body. An example of this is Puerto Rico, where the Constitution is relatively short, but is accompanied by more than 2,500 pages of explication. In other words, short constitutional provisions tend to generate more under-determinacy than longer and detail-rich explications. Under-determinacy is still present, but considerably reduced.

B. *Original Public Meaning*

Original public meaning focuses on what the general public thought the constitutional text meant at the time of its adoption.¹⁸ While there

17. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987). Under-determinacy occurs when the communicative content of the text does not provide sufficient normative content to solve a particular legal issue.

18. See generally Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 15 GEO. L.J. 1765 (1997); James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433 (2013); Richard

seems to be some doubt about whether this is limited to *communicative* meaning, or if it also extends to *legal* or *normative* meaning,¹⁹ there is agreement that the only binding source is the text itself. And because the text needs to be accepted by the public in order to become the constitution, the authoritative source of constitutional meaning is the understanding of the general public at the time.

In this model, the authors' role is limited to enacting the text. As a result, "the authors lack either legitimacy or authority as to the meaning and effects of the text they adopted *beyond the act of adoption itself*."²⁰ It would appear that original public meaning privileges two important elements: authority and publicity. The main problem with original public meaning is that most, if not all, of its normative claims are specifically and exclusively designed for the U.S. Constitution, which was written in secret (as opposed to publicly) and in which the Framers did not have the power to adopt the text, only to suggest it to the ratifying public (thus lacking authority).

Original public meaning is definitely not suited for the type of constitution-making process analyzed in this Article. As I have argued, in democratic, public, participatory, popular, and socially transcendental processes of creation, the line between framers and the general public blurs significantly. As a result, there is no real distinction between the authors' intent and public meaning.

Original intent and original public meaning have many differences and similarities. In terms of original explication, these differences and similarities are almost irrelevant. This is because original explication encompasses *both* intent and public meaning.

In the original explication model, *because of the public nature of the constitution-making process, the explication becomes the public meaning of the words*. In other words, by exteriorizing and publicizing their explication, the public is aware that the meaning of a particular word or set of words, *as used in the constitution*, is what the framers explained it to mean. For example, if the framers publicly state their understanding of what "cruel" or "imminent" or "reasonable" means, the public meaning of

S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016).

19. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 586–91 (1998).

20. Farinacci-Fernós, *supra* note 9, at 250 (emphasis in original).

those words *in the constitutional context* is the meaning given by the framers.

Another important difference between the original explication model and original public meaning originalism is the effect it has on the interpretation-construction distinction. Originalists in the United States have a theory of interpretation, not construction.²¹ As such, originalism primarily focuses on the analysis of the communicative content of the constitutional text, leaving as a separate issue the matter of giving legal effect to that content, particularly in situations where the communicative content is under-determinate as to constitutional doctrine.

In the case of original explication, while there is room to distinguish between interpretation and construction, *explication affects both*. This is because explication privileges both the communicative meaning the framers gave to the words they were adopting, *as well as* the legal effects they wanted them to have. As such, original explication is both a theory of interpretation *and of construction*. In that case, the legal effect the framers gave to a particular provision *can actually contradict the semantic meaning of the words*. This would negate the contribution thesis in a certain way, although this too can be reconciled by stating that the semantic meaning of the words *is* what the framers explicated. Thus, when an apparent contradiction emerges between semantic meaning and the framers' statements as to its legal effects, we can either say that explication trumps semantic meaning, or that it *alters it*, thus eliminating the contradiction. In other words, the framers' explication as to legal effect *also* impacts the semantic meaning in the first place.

C. Subjective Teleological Model

The subjective teleological model is very similar to the original intent approach. It is also similar to original explication. It seems to serve as a bridge between both of them. The subjective teleological approach turns to the framers instead of just the text—thus *subjective* instead of *objective*—and it focuses on the *purposes* that animated or motivated the framers—thus *teleological*.²²

21. "It is important to keep in mind that originalism is warranted as a theory of *interpretation*—that is, as a method for determining the meaning of the words written in the Constitution." Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108 (2001); *see also* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 5–6 (2015).

22. *See* András Jakab, *Judicial Reasoning in Constitutional Courts: An European Perspective*, 14 GERMAN L.J. 1215 (2013); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70 (2006).

But unlike original intent or original explication, *the subjective teleological model limits its inquiry to purpose*, potentially leaving out other issues related to intent, such as semantic meaning, scope, and application. Therefore, it seems that the subjective teleological model is a narrower version of the original intent approach.

But in the specific case of teleological constitution, the gap between original explication and the subjective teleological model narrows considerably *because, since purpose is the driving force behind the constitutional project, purpose will play a prominent role in the explication given by the framers*. While original explication does not limit itself to purpose, the latter is front and center in teleological systems because of the substantive nature of the constitutional text and structure. Since the framers drafted a teleological constitution with stated policy goals, the subjective intent of the framers in terms of purpose, *as articulated in their explications*, becomes the main ingredient of constitutional interpretation and construction.

But the case for original explication seems stronger in teleological constitutions than the one in favor of the subjective teleological model, precisely because the former is considerably more comprehensive as to the tools it provides and the constraint it creates. This is particularly true in situations where those teleological constitutions were the product of highly democratic, public, popular, participatory, and socially transcendental processes of creation. In these situations, there are two elements that should be taken into account. First, the normative force generated by the creation process. Second, the teleological nature of the constitution. As such, *both* must be taken into account, and the subjective teleological model focuses too much on the latter and too little on the former. The original explication model accounts for both, privileging the purposes stated in the explications, but also focusing on other intent-related statements and elaborations.

D. *Original Methods*

This model states that “the constitutional text should be interpreted using the tools the framers themselves used in the process of constitutional interpretation, and thus . . . believe would be used by later interpreters.”²³ As such, this model does not have inherent normative or substantive content, since it will vary depending on the particular constitution and the

23. Farinacci-Fernós, *supra* note 9, at 261. See also John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2008); John O. McGinnis & Michael B. Rappaport, *Original Methods of Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

views of its framers as to the prevailing methods of interpretation. This model proposes that the correct method of interpretation is the one the framers thought would be used. The reasoning behind this model is that an author will take into account what he or she believes will be done by interpreters. That belief necessarily requires identifying the prevailing methods of interpretation at the time the framers adopted the constitution.

The main difference between this model and original explication is normative. The correct method of interpretation does not respond to the authors' views about hermeneutics, but to the normative force generated by the constitution-making process itself. In other words, it is the *process*, not the views of the framers as to interpretation, which will command the appropriate interpretive methodology. Of course, it may be that said process will take us back to the framers' wishes as to hermeneutics, but it is the result of a different normative path. The original methods model treats the framers' views on interpretation as authoritative as a starting point. Original explication starts with the process, and depending on the normative force it generates, *then* may turn to the framers, not because the framers wanted it so, but because the process of creation requires that approach.

V. ORIGINAL EXPLICATION AND MODERN STATE CONSTITUTIONS

As we just saw, there are two key elements that relate to our current analysis. First, the *content* of the constitution—modern teleological state constitutions, which tend to include a whole array of policy-laden provisions, particularly in the realm of individual and collective rights, as well as to matters related to economic organization, social structure, environmental protection, labor relations, and cultural diversity.²⁴ Second, the *process* that created the constitution itself—highly democratic, public, participatory, popular, and socially transcendental processes that, as a result, gave tremendous authority and legitimacy to the persons and bodies charged with constitutional drafting.

While not inherent to them, post-liberal teleological constitutions tend to be, as a historical matter, the result of these types of social processes, from social reform movements in Puerto Rico, mobilized indigenous majorities in Bolivia, or a transition from apartheid in South Africa. The same can be said about successful democratic and civic movements in various U.S. states during the twentieth century. The content of these constitutions is highly teleological and post-liberal, and

24. See generally Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31 (2018).

the process of their creation can be characterized as transcendental, historical, and social moments in the life of the political community.

As a result, original explication interacts with modern teleological constitutions in two ways. First, it fits neatly with the process of creation by adequately taking into account the will of the constitution-creating body when it comes to interpreting and implementing the constitutional content. It seems that *some sort* of originalist approach may be required when the constitution was the result of a highly democratic and transcendental constitution-making process. Taking the framers out of the picture would seem awkward and even illegitimate. Second, original explication allows for the maximum use of the teleological nature of these types of constitutions by adequately taking into account intent, purpose, and history—elements which are inherently linked to the substantive content of teleological constitutions.

Unlike the other originalist approaches, original explication appropriately combines both the issues of process and substance, while maintaining a normative base of justification that allows for future events to require its abandonment. In other words, original explication is the only model that adequately acknowledges the importance of the constitution-making body as the source of constitutional meaning (process) and the importance of the actual content of the text itself (substance). It is also designed to take into account future procedural and substantive developments that could require a course correction as to methodology.

Too much focus on intent *outside* the constitution-making process—for example, focusing on private correspondence over official statements made during the constitutional assembly—would negate the importance of the process of creation itself as the main legitimizing factor of the constitutional project. As such, original explication works better than original intent by focusing on the formal and official statements made during creation, as well as its accompanying historical context. The same would be true as it relates to the subjective teleological model, which would seem too narrow and insufficient.

Precisely because the type of creation process discussed in this Article tends to generate constitutions that are full of *substantive content*, greater emphasis should be given to non-textual sources. In other words, since the *text itself and the structure of the constitution are teleological in nature*, thus an explicit part of the constitutional project, the *text becomes part of the why*. Original explication unites process and substance, taking into account that in these circumstances, process creates substance and substance is a reflection of process. In both instances, the process of adoption becomes one of the central aspects, if not *the* central aspect, of the constitutional project itself.

As a historical matter, modern teleological constitutions tend to be of a progressive bent. As such, the use of an original explication approach tends to produce *broad and progressive results*. In other words, the explication can—although not always—generate a *self-updating text*, because the framers themselves precisely *explained* their broad and progressive intent. In some instances, this could even empower courts to go beyond the specific intent of the framers, as they have manifested their wish that the broadest interpretation and construction be given to their words, in case they fail to take into account future developments. When true, this would totally obliterate the originalism-as-narrow and living-constitutionalist-as-broad dichotomy, *because the original explication of the framers can either require a living constitutionalist approach or be such that it produces the broad approach to constitutional adjudication*. Additionally, original explication may reveal the underlying factual premises that guided the framers. Thus, courts are better equipped to deal with the issue of changing circumstances, while maintaining fidelity with the original constitutional project and the will of its framers.

VI. ORIGINAL EXPLICATION AND CONSTITUTIONAL THEORY

Original explication can constitute a breakthrough in modern constitutional theory because it is an interpretive method that combines the transcendental process component of teleological constitutions with its substantive content. As such, it can eliminate much of the under-enforcement problems that some of these systems, particularly U.S. states, have faced because some courts still cling to interpretive models that fail to take into account these two elements.

Of course, interpretive methods are only one side of the coin. The other side is the need for courts to accept the new roles assigned to them by constitution makers in teleological systems, which includes judicial intervention into policy areas. Teleological state constitutions represent a direct challenge to classic concepts of the judicial role in general and how courts apply constitutional provisions in particular. Modern teleological constitutions have considerably broadened the catalogue of issues, arguments, types of controversies, and choices of remedies facing courts. As such, current models of judicial enforcement of constitutional provisions are ill-suited for the application of substantive policy provisions. New methods are needed.²⁵

25. See generally Ackerman, *supra* note 13, at 1044; Jorge M. Farinacci-Fernós, *Constitutionally Required Judicial Activism: Re-Examining the Role of Courts in Modern Constitutional Adjudication*, 28 KAN. J.L. & PUB. POL'Y 36 (2018).

For example, the court-as-primarily-a-negative-legislator view has been both transformed and destroyed: (1) transformed because the content of the substantive protections, even in negative rights cases, will often require courts to intervene in a whole host of public policy issues where the constitution has taken a position, from labor rights to economic organization; and (2) destroyed because they have added a wide array of issues which transcend the mere implementation of negative rights and provisions, ranging from positive rights against private parties to deeper intervention in policy matters where they must implement the framers' designs over the wishes of current ordinary politics. The list seems endless: positive horizontal rights articulated as rules, negative vertical rights articulated as principles, specific policy provisions, and so on.

Modern state constitutions that are teleological in nature offer a challenge to state courts, and original explication constitutes an interpretive alternative that can adequately take into account both the process of creation and the substantive content of these constitutions, thus allowing courts to enforce these constitutions *as they were designed to be*, thus strengthening democratic self-governance through judicial action and intervention. Quite the revolution indeed. As we've seen in these cases, original explication is both a normative obligation and a helpful tool.

Many modern state constitutions are under enforced, particularly when it comes to their substantive policy provisions.²⁶ One of the reasons for this problem is that many state court judges take too many methodological pages from the Supreme Court of the United States, which interprets the federal Constitution. As such, state courts fall into several traps.

First, the *reasons* for using or discarding a particular model of interpretation will differ when analyzing a modern state constitution, as opposed to the older federal text. This creates the risk of discarding adoption history-based models of interpretation for reasons that are only, or at least mainly, applicable to the U.S. Constitution. The normative and empirical justifications for using those models in the state context remain present despite their lack of applicability in the federal context.

Second, the *effects* of using a particular intent or adoption history-based model of interpretation are considerably different in the state context. For example, state constitutions, as compared to their federal counterpart, tend to include substantive policy matters. When this is combined with intent or adoption history-based models of interpretation, the end results would be different from what normally occurs in federal

26. See Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 871 (2008).

courts. As such, courts should take a closer and deeper look into how these interpretive models would aid in the development of state constitutional law.

Third, the current models of interpretation used, or discussed, in the United States are premised on the *structure, framework, and content* of the federal Constitution. Yet many modern state constitutions have a whole array of provisions that simply have no remotely similar counterpart in the federal text. Therefore, there is a normative and methodological gap that risks deepening state constitutional under-enforcement.

Also, the arsenal of tools available to state courts in modern teleological systems is varied. The first tool is the use of reasonableness tests in order to ascertain the government's—or a private party's—duty in the context of the enforcement of positive rights. Second is the comprehensive use of the negative legislator role in situations where there are policy rules which control legislative and executive discretion. Third is the effective use of the injunctive and mandamus powers. Fourth is the expansion of rights protection as required by the specific rule-broad language combination. Fifth is *the development of new remedial measures and writs that adequately take into account the substantive content of teleological constitutions*. The use of these tools is particularly adequate if the original explication actually supports it.

CONCLUSION

Modern teleological state constitutions that are the result of transcendental social processes pose a challenge in terms of interpretive methodologies and models of construction and adjudication. Current models are insufficient to guarantee their adequate enforcement, particularly in terms of putting into effect their substantive policy content.

Furthermore, because of the ideological connotations of these types of constitutions, the issue of continued allegiance, fidelity, and connection between the current political community and the original constitutional project is crucial. As such, *when the original project still holds*, some sort of intent or adoption history-based approach is warranted. More importantly, when the process of constitutional creation constitutes a vital aspect of the political community, the role of the framers is augmented. Hence, original explication, which takes into account both the teleological content of these constitutions and their highly dynamic and democratic process of creation.

Original explication is a starting point, not an endgame. Its own normative basis requires a constant analysis of the level of legitimacy, authority, and fidelity enjoyed by the constitutional project. This includes

measuring these factors over time, for a process that once enjoyed them may lose them in the future. Original explication only works when the *original process still commands legitimacy and authority*. Continued fidelity to the process and its substantive product will be needed for the model to endure. If, in fact, the original process, because of its democratic, public, participatory, popular, and socially transcendental character, still commands legitimacy and authority, I believe that original explication is the required method of constitutional interpretation, construction, and adjudication, at least until another similar process comes along. In the end, time will tell if what we said then is what we want now.